

Testimony of

Future of Music Coalition

On

**“The Role of Voluntary Agreements in the US
Intellectual Property System”**

Hearing

**House Subcommittee on the Courts, Intellectual
Property and the Internet**

September 18, 2013

House Subcommittee on the Courts,
Intellectual Property and the Internet
2138 Rayburn Office Building
Washington, DC 20515

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Dear Chairman Goodlatte, subcommittee Chairmen Coble and Marino and members of the committee:

It is a privilege to submit the following testimony for the record in this hearing on matters relating to voluntary agreements to aid in the enforcement of United States intellectual property (IP) law.

Future of Music Coalition (FMC) is a national nonprofit education, research and advocacy organization for musicians. For 13 years, we have observed changes to traditional industry business models, and sought to inform artists about what these changes could mean for their ability to reach audiences and grow their careers. With regard to music copyrights, FMC recognizes the need to protect the rights of artists, while establishing systems that provide the returns on investment necessary to a diverse and sustainable creative sector.

There is little doubt that rapid developments in digital technology have created tremendous upheaval to traditional music business models and posed any number of challenges to individual creators with regard to their enumerated rights under US copyright law. These developments have, however, also ushered in new opportunities for creative expression and commerce while enabling for the first time in history the ability for artists to publish their work globally and near-instantaneously with the click of a mouse (or the tap of a screen).

It is not necessary to itemize the benefits of networked digital technologies in this testimony. Rather, we will examine why individual creators and independent

rightsholders must be a part of any proposed solutions to copyright enforcement—voluntary or legislative—as these constituencies are the most in need of meaningful protections yet also must retain access to today’s tools of distribution and the innovations still to come.

We are pleased that many of the theoretical concepts advanced at the beginning of the last decade by Future of Music Coalition and our allies in the musician, composer, music manager and independent label communities have come to pass. This is in no small part due to the open structures of the internet, which allow for the development of innovations that are now providing the critical infrastructure of a legitimate digital music marketplace. Today’s musicians and composers have numerous paths to audiences, and fans have an increasing array of fully licensed digital music platforms with deep catalogs of music available at a low cost and with ever-expanding interoperability.

The economics of these various platforms differ, and many are yet to mature. Existing copyright law can, by design or happenstance, aid or hinder the development of legitimate digital music services. We recognize the importance of Congress taking a close look at the current copyright regime with an eye towards optimizing the law to reflect today’s realities and accommodate the future. Intellectual property enforcement is a necessary aspect of this review, and we commend the Subcommittee for holding today’s hearing on how the needs of creators and rightsholders might be balanced with the importance of preserving platforms for speech as well as Congressionally recognized exceptions to existing protections.

There is no doubt that unauthorized distribution and access to expressive works undermines the viability of the legitimate digital marketplace, and effects everything from the perceived and actual value of existing works to the investment in the creation of new works. Enforceable IP protections are essential to the ongoing development of exciting services that can attract users, as well as the propagation of high-quality content on these services. We would advise the subcommittee at the outset, however, that not all musicians and composers are direct beneficiaries of copyright, though many benefit

indirectly from the commercial opportunities generated from copyrighted works.¹ Those who have historically made a living from copyright—such as songwriters—may feel the negative impacts of piracy disproportionately to other music creators. However, we do feel that it is important to recognize that musical artists are diverse and highly specialized and that their collective interests are not always in perfect alignment with industry trade groups and their corporate members.

FMC spends considerable effort to conduct original research into how these developments affect actual music creators. In 2010, FMC launched Artist Revenue Streams—a multi-stage research project to assess whether and how musicians' revenue streams are changing in an evolving music landscape.²

As a small musicians' nonprofit, we are limited in our ability to assess every aspect of the copyright industries and how musicians and composers fit into the overall picture. However, we hope that our work in identifying 42 discreet revenue streams available to music artists and how this compensation breaks down according to a range of factors—from professional affiliation to vocational role to geographical location—proves useful to the subcommittee and anyone curious about how musicians and composers experience these issues.

Another large chunk of our work concerns translating public policy and voluntary agreements to increase artist awareness and understanding of various proposals and initiatives. As this hearing is focused on voluntary agreements and best practices, we will highlight our recent efforts to document and translate these approaches for the benefit of creators and the public.

Pros and Cons of Voluntary Agreements and Initiatives

In the wake of contentious debates around the Stop Online Piracy Act (SOPA) and the PROTECT IP Act (PIPA), it's easy to understand why non-legislative approaches to IP

¹ Thomson, Kristin. "Off the Charts: Examining Musicians' Income from Sound Recordings | Artist Revenue Streams." *Artist Revenue Streams*. Future of Music Coalition, 12 June 2012. Web. 25 Sept. 2013.

² Artist Revenue Streams. Future of Music Coalition, 01 Jan. 2010. Web. 25 Sept. 2013.

enforcement are being pursued. When stakeholders can come together to identify shared interests and potential solutions, it may result in an approach that's more collaborative and flexible than a legislative mandate. But there are also strictly practical reasons for pursuing voluntary initiatives. Partisan gridlock in Congress can mean that passing any law is a challenge. If, for example, the executive branch can get parties to the table, there may be a clearer path to implementation. Voluntary agreements may also allow corporations to avoid regulations that they find constraining or objectionable. Still, the threat of legislation can be a spur towards participation, and therefore a path to workable solutions. Aligned incentives can act as a corrective to the expensive and counterproductive combat that too often spills over into legislative branch chambers.

There are, however, some drawbacks to voluntary approaches. First, there is not always a dedicated body to compel transparency and provide oversight. Second, there is the possibility that multi-stakeholder compromise may water down any initiative to the point that it is unlikely to meaningfully impact the problem, should the parties necessary to implementation even agree to whether a problem exists.

Given the alternative, however, it seems clear that voluntary approaches are the best bet for a range of parties to collaborate on solutions that don't inherently disadvantage any one sector, while retaining the flexibility to respond to unanticipated challenges or unforeseen consequences of a given initiative. We commend the lawmakers and officials who have stepped up to the challenge of bringing parties to the table—particularly the Office of the Intellectual Property Enforcement Coordinator (IPEC)—as a means of avoiding the time, monetary and reputation costs of poorly thought-through or overly politicized legislation.

The Copyright Alert System (CAS)

FMC observed closely developments around establishing a protocol for Internet Service Providers (ISPs) and rightsholders to collaborate on a non-legally binding enforcement agenda. Initial reports and the subsequent Memo of Understanding between rightsholders and ISPs indicated that the CAS would not be overly punitive but rather a shared attempt

to educate alleged infringers of the availability of legal platforms with the potential of mitigation measures should a series of warnings—often referred to as “graduated response”—remain unheeded by an internet user. We are sensitive, as are many, to the need to preserve access to a critical lifeline, and were pleased that implementation of the CAS did not include provisions to disconnect Internet users at any point in the process. We also applauded the decision to avoid potentially invasive technologies to monitor the network, but instead rely on public trackers to scan for infringing activity. We would reinforce the notion that transparency and oversight of the CAS is crucial not only to its effectiveness, but also to build trust among communities that have too often come to regard one another with suspicion. As our March 07, 2013 *Billboard* Op-Ed³ pointed out, “[Such] an effort will benefit from transparency in order to build trust among stakeholders and to measure effectiveness. The former is key to making smarter choices around enforcement and growing the legitimate marketplace in a way that benefits not just the big companies, but also creators. In this way, incentives might be better aligned and artists and fans can gain confidence in today’s music ecosystem. Even if it was designed to limit unintended consequences, the CAS must operate in plain sight.”

Payment Processor Best Practices for Online Copyright Infringement

American Express, Discover, MasterCard, PayPal and Visa are among the payment processors who have agreed to adopt voluntary measures to deal with websites trafficking in ill-gotten IP. Rightsholders can now interface with the payment processors regarding alleged infringement of their rights online. The payment processors will then contact the online merchant—a site or service offering the content—about the complaint and respond in a manner consistent with protocols agreed upon in these best practices. This new system hopefully establishes a reasonably open, transparent and efficient mechanism for reporting infringement direct to the payment processor for review and potential action. FMC took the time to describe in some detail the ins-and-outs of these voluntary provisions in order for individual artists to avail themselves of the process.⁴ We have, and

³ Rae, Casey. "Will the Copyright Alert System Break the Internet? By Future of Music Coalition's Casey Rae." *Billboard*. N.p., 07 Mar. 2013. Web. 25 Sept. 2013.

⁴ "Payment Processor Best Practices for Online Copyright Infringement." *Payment Processor Best Practices for Online Copyright Infringement: What It Means for Musicians*. Future of Music Coalition, 24 Oct. 2011. Web. 25 Sept. 2013.

continue to encourage the timely evaluation of this agreement to monitor for potential abuses as well as to identify its successes.

Best Practices for Online Ad Networks

“Best Practices Guidelines for Ad Networks to Address Piracy and Counterfeiting” is a joint effort to reduce the flow of ad revenue to infringing websites. The initiative is supported by the Interactive Advertising Bureau, along with 24/7 Media, Adtegrity, AOL, Condé Nast, Google, Microsoft, Yahoo! and SpotXchange. It is beyond our technical aptitude to comment on the specific aspects of advertising networks germane to a discussion of combatting infringement, but we are impressed at the willingness of participating parties to identify a path forward that does not appear to compromise the flexibility of an important new avenue for legitimate commerce. Perhaps unsurprisingly, there are some in the music community who feel that these agreements do not go far enough.⁵ For our part, FMC encourages a thoughtful, inclusive and deliberate approach to measure the effectiveness of this entirely new protocol before passing judgment on the efficacy of a system that is still in its nascent stages of implementation.

Conclusion

FMC remains committed to advocating for a copyright regime that reflects the balance between creator and those who benefit from exposure and access to a diversity of expression. We support and will continue to participate in ongoing discussions among a range of stakeholders—including the often-overlooked independent sector—regarding mutually beneficial approaches to copyright enforcement. We humbly offer our perspectives and data to the subcommittee and the entire Congress for its consideration as it continues its inquires into the contours of intellectual property in the digital age.

Casey Rae
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⁵ "But This Time We Mean It... Welcome To The Ad Tech Time Machine..." *The Trichordist*. N.p., 24 July 2013. Web. 25 Sept. 2013.